UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 736

Case No. 805: RACHKOV

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President ; Mr. Mikuin Leliel Balanda;

Whereas, on 28 April 1994, Tzvetan Rachkov, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 15 August 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"(a) To decide that the Applicant was denied due process in the decision-taking procedure for the filling of the post of Chief, UNOG Personnel Administration Section (UNB-33840-EP-5001), after it had fallen vacant on 1 December 1992.

...

(f) To order a due process of selection against the vacancy, effective 1 December 1992, of the post of Chief of Personnel Administration Section at the United Nations Office at Geneva (UNB-33840-EP-5001).

...

(h) To rule that, if the Respondent is not in a position to satisfy the order specified under (f) above, the name of the Applicant be included in the 1992 P-5 promotion

register, and that the Applicant's promotion to P-5 level be effective as of 1 July 1992, the salary increments due to the Applicant for the period July to November 1992 being considered adequate compensation for the moral prejudice caused to the Applicant by the denial of due process in the case under consideration."

Whereas the Respondent filed his answer on 17 November 1994;

Whereas the Tribunal put a question to the Respondent on 3 November 1995, to which he responded on 7 November 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Office in Geneva (UNOG) on 1 April 1979, as a Personnel Officer, at the P-3 level, on secondment from the Government of the People's Republic of Bulgaria, on a two year fixed-term appointment. His appointment was renewed on 1 April 1981, for a period of five years. On 1 April 1983, he was promoted to the P-4 level. On 1 April 1986, the Applicant's appointment was extended for one year and on 1 April 1987 and 1 April 1989, it was extended for two year periods. After several short interim extensions, it was extended again through 31 December 1993. From 1 June 1992 to 23 April 1993, the Applicant was designated Officer-in-Charge of the Personnel Administration Section (PAS). On 3 August 1993, the Applicant was assigned on mission to Haiti as Chief of Personnel of MICIVIH. Upon the expiration of his fixed-term contract on 31 December 1993, the Applicant's appointment was extended several times, beyond his age of retirement, through 31 December 1994, when he separated from service.

On 1 December 1992, while the Applicant was acting as Officer-in-Charge, PAS, the post of Chief, PAS, became vacant due to the promotion of its incumbent. In a memorandum dated 7 January 1993, the Applicant expressed his interest in the post to the Chief, Personnel Service, who, on 21 January 1993 informed the Director of Personnel. On 3 March 1993, the Applicant formally submitted his

candidature for the vacant post. On 10 March 1993, the Chief, Personnel Service, informed the Applicant of the decision, taken on 13 February 1993, to appoint another staff member to the post of Chief, PAS, by lateral transfer.

In a memorandum dated 12 March 1993, to the Chief, Personnel Service, the Applicant protested that decision. On 17 March 1993, he requested the Secretary-General to review the decision, and to suspend its implementation, pending his appeal. In the meantime, on 16 March 1993, the Applicant sent a copy of his request for review to the Joint Appeals Board (JAB) requesting suspension of action on the decision. In its report of 2 April 1993, the JAB made no recommendation in support of the Applicant's request. On 13 April 1993, the Secretary-General informed the Applicant that he had decided to take no further action on the request.

On 17 May 1993, the Applicant lodged an appeal with the JAB against the decision to fill the post of Chief, PAS, by lateral transfer. On 10 June 1993, he filed a complaint with the Panel on Discrimination and other Grievances. The Panel's report, which was submitted to the JAB on 29 July 1993, found that the Applicant had been denied the right to fair consideration for the post. It recommended that he be assigned temporarily to a P-5 post pending his assignment on mission at that level. It further recommended that the Applicant's name to be included in the P-5 promotion register of 1992.

The JAB adopted its report on 4 February 1994. Its findings, conclusions and recommendations read, in part, as follows:

> "...
>
> 26. The Panel found that based on the Appellant's experience, namely deputizing for ten years for the Chief of PAS acting as Officer-in-charge, and on his performance evaluations, he was well qualified for the post and should have been fairly taken into consideration when the post of Chief of PAS became vacant.

27. However after a thorough review of all circumstances of the case, the Panel found that the Appellant was not considered by the Respondent for the vacant post, therefore the Appellant was denied the consideration that was owed to him under the relevant procedures and directives in connexion with the internal promotion review. Not only was the Appellant's candidature not taken fairly into consideration but the Respondent did not see fit to answer the Appellant's correspondence.

28. Therefore the Appellant has been denied due process for there was a reasonable belief on his part that he would at least be considered for the post and if rejected entitled to receive a suitable explanation as held by the Administrative Tribunal in Judgement No. 412 Gross.

...

Conclusions and Recommendations

33. In view of the foregoing, the Panel concludes that the Appellant was denied due process with respect to the consideration to which he was entitled.

34. Considering the Respondent's silence and the incapacity of the Panel to find any relevant document used to fill in the vacant post of Chief of Personnel Administration Section, the Panel further concludes that the whole process was surrounded by lack of transparency and therefore infringed the rights of the Appellant.

35. However, the Panel bears in mind all the circumstances of the case, including that the Appellant has been sent on mission since 4 August 1993 at P-5 level and has been extended beyond the statutory retirement age.

36. Accordingly, the Panel recommends that the Appellant be awarded a sum equivalent to three-months of the Special Post Allowance the Appellant was entitled to when he was Officer-in-charge of the Personnel Administration Section in compensation of the moral prejudice suffered.

37. The Panel makes no further recommendations in support of this appeal."

On 23 February 1994, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy

of the JAB report. He informed him that the Secretary-General had decided as follows:

> "... to accept the Board's recommendation and ... that you be awarded a sum equivalent to three months of the Special Post Allowance you were entitled to when you were Officer-in-Charge of the Personnel Administration Section."

On 28 April 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. ST/AI/373, which provides for the publication of all vacancies not filled by lateral transfer within the Department or Office concerned, was not adhered to by the Respondent when he filled the vacant post of Chief, PAS, by lateral transfer from outside the office.

2. The Applicant, who encumbered the post on an acting basis, had repeatedly expressed his interest in the post and had a legitimate expectancy to be fairly considered for it.

Whereas the Respondent's principal contentions are:

1. The application is not receivable pursuant to Article 7.2 of the Tribunal's Statute because the Secretary-General accepted a favourable recommendation of the JAB.

2. The amount of damages awarded by the JAB and accepted by the Respondent was reasonable in all the circumstances and should not be changed by the Tribunal.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. The Tribunal first turns its attention to the issue of receivability. The Respondent argues against receivability on the ground that the Secretary-General accepted the JAB's recommendations and accordingly decided to grant the Applicant compensation. As a consequence, in the Respondent's view, the outcome of the recourse has not been unfavourable to the Applicant and the final decision is not subject to challenge under article 7.3 of the Tribunal's Statute.

II. On this issue, the Tribunal recalls its Judgement No. 739, Chakravarti (1995). The relevant paragraphs read as follows:

> "VI. ... In the Tribunal's view, the right of staff members to appeal is fundamental and it may not be curtailed unless a specific text clearly so provides, as, for instance, in the last clause of article 7.3. In the present case, no text bars the Applicant from coming before the Tribunal.
>
> VII. The Respondent relies on the fact that the JAB has accepted the Applicant's views and that the Secretary-General has, in turn, accepted the JAB's recommendation. On these grounds, the Respondent concludes that the outcome has not been unfavourable to the Applicant, and that, therefore, article 7, paragraph 3 is not applicable. In the Tribunal's view, the Respondent's reading of article 7 of its Statute is excessively narrow and cannot be accepted by the Tribunal. The Tribunal finds that it is for an applicant, in the first instance, to decide whether the outcome of the recourse before the JAB has been favourable to him or her. In this case, it is not irrational for the Applicant to hold the view that the outcome has been unfavourable, because, even though on the whole, his claim was upheld, the compensation granted was, in his opinion, insufficient.
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> VIII. The Tribunal considers that, inasmuch as the Applicant may lawfully contend that the Secretary-General's decision has been unfavourable on that ground, the application is receivable under article 7, paragraph 3 of the Tribunal's Statute. It therefore decides to consider the case on its merits."

III. For the foregoing reasons, the Tribunal decides that the application is receivable and shall consider the case on its merits. In doing so, it bears in mind, at the outset, the letter of 23 February 1994 from the Officer-in-Charge, Department of Administration and Management, informing the Applicant that "The Secretary-General ... has decided to accept the Board's recommendation". It also bears in mind paragraph 2 of the Respondent's answer in which the "Respondent acknowledges that the decision of the Secretary-General in this case has, in fact, accepted the finding of facts and conclusions made by the JAB", which include the following:

> "26. The Panel found that based on the Appellant's experience, ..., and on his performance evaluations, he was well qualified for the post and should have been fairly taken into consideration ...
>
> 27. ... The Panel found that the Appellant was not considered by the Respondent for the vacant post, therefore the Appellant was denied the consideration that was owed to him under the relevant procedures and directives in connexion with the internal promotion review. ...
>
> 28. Therefore the Appellant has been denied due process ...
>
> 29. As for the issue of the procedure followed by the Administration in implementing the lateral transfer of the candidate from HABITAT ... the Panel was unable to find any recommendation from the Head of the Personnel Service, UNOG, to OHRM as required by Paragraph 8 of administrative instruction ST/AI/373, ... Moreover the Panel did not find any indication that other candidates were considered to fill in the vacant post.
>
> 30. ... the Panel found that the Respondent had failed to fulfil its obligation with respect to fair treatment and proper and equitable procedures for staff members."

IV. The Tribunal finds that in view of the failure by the Respondent to adhere to the procedure prescribed by ST/AI/373, paragraph 8, with respect to lateral transfers, this case does not

present the issue of standing that was decisive in e.g. Judgement No. 677, Daure (1994). Prior to the eventual action by the Respondent in filling the post, the Applicant who had held the post in an acting capacity, was not fairly considered for it, as was his right. He is therefore entitled to compensation for that, as well as for the harm to him associated with the non-compliance with ST/AI/373. The Tribunal concludes that the recommendation of the JAB that, the Applicant be paid an SPA for three months, does not fully compensate him for the injury suffered.

Accordingly, the Tribunal orders the Respondent, in addition to the payment of the SPA recommended by the JAB and accepted by the Secretary-General, to pay the Applicant three months of his net base salary on the date of his separation from service.

V. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary